Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

77-395

October Term, 1977

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CITY OF PHILADELPHIA

*v.*

JOHN E. BULLION, *Appellant*

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# BRIEF IN OPPOSITION TO MOTION TO DISMISS

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## THE ORDER OF THE COMMONWEALTH COURT IS A FINAL DECREE FOR THE PURPOSES OF APPEAL UNDER 28 U.S.C. §1257.

The present appeal under 28 U.S.C. §1257(2) concerns a Pennsylvania trial court's denial of appellant's preliminary objection to the personal jurisdiction of the court over the appellant. The appeal to the Commonwealth Court was made pursuant to the Act of March 5, 1925, P.L. 23, 12 P.S. §§672, et seq., (Exhibit "A") which provides that such appeal is proper "as in cases of final judgment." This Statute provides that

> "A failure to appeal within the time specified will be deemed a waiver of all objections to jurisdiction over the defendant personally."

Under Pennsylvania law, the decision of an appellate court on an appeal from a determination concerning personal jurisdiction under the Act of March 5, 1925, becomes the law of the case and bars the defendant from raising the issue on the later appeal on the merits. *Drummond v. Drummond*, 414 Pa. 548, 200 A.2d 887 (1964). Thus, the decision of the Commonwealth Court in the present case will not be merged into a final decision in this case and is totally non-reviewable at the time of a review on the merits of this case. For state purposes it is final.

In the appellant's Jurisdictional Statement, two cases were cited which he believed sustained the jurisdiction of this Court on the question of finality—*Rosenblatt v. American Cyanamid Co.*, 86 S.Ct. 1, 15 L.Ed 2d 39 (1965) (Goldberg, J., in chambers) and *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976). Both of these cases stand for the proposition that certain types of decrees, which might otherwise be deemed interlocutory, are final within the purview of 28 U.S.C. §1257. Annot., 29 L.Ed. 2d 872, 881 (1972). This proposition had its origin with this Honorable Court's decisions in *Mercantile Nat'l Bank v. Landeau*, 371 U.S. 555 (1963) and *Local 438 Construction and General Laborers' Union v. Curry*, 371 U.S. 542 (1963). *See*, Note, *The Requirement of a Final Judgment or Decree for Supreme Court Review of State Courts*, 73 Yale L.J. 515 (1964).

The appellant submits that the opinion in *Rosenblatt* clearly establishes his claim of finality in the present appeal. Mr. Justice Goldberg set forth a three-part test for determination of finality in the present type of case: (1) a final assertion of jurisdiction without further review of the issue in the state court; (2) a threat of serious erosion of national policies; and (3) a state judgment on an issue anterior to and separate from the merits and not enmeshed with the factual controversy of the case. In *Rosenblatt*, Mr. Justice Goldberg concluded that there would be a serious erosion of national policy in that there is a "due process right against subjection to excessive state assertions of *in personam* jurisdiction." 86 S.Ct. at 3. Mr. Justice Goldberg ruled that the judgment in the state court was a final one for purposes of 28 U.S.C. §1257.



The appellant contends that his case fits the three-part test of *Rosenblatt* in the following manner: (1) Under Pennsylvania law, there would be no further review of the determination of the Commonwealth Court; (2) there is not only a serious threat of erosion of the Due Process rights of the appellant, but also his rights under the Plenary Powers Clause of the United States Constitution; and (3) the decree concerned an issue which was anterior to and separate from the merits of the present case, and, like *Rosenblatt*, not enmeshed in the factual controversies of the case.

The appellee contends that the present appeal is distinguishable from *Rosenblatt* factually and legally in that the present case only concerns an issue of "the propriety of the form of service under the Constitution of the United States" and not a "true jurisdictional question and real issue as to which forum the appellant . . . would have to defend in." (Motion to Dismiss or Affirm, p. 8). This is a difference without a distinction if, in fact, this difference exists. Primarily, both cases concern a serious erosion of national policy—a violation of federal constitutional rights. In addition, the appellee makes the unjustified assumption that it would be able to make personal service in Pennsylvania upon the appellant. Just like in *Rosenblatt*, the choice is between two different forums—Pennsylvania and New Jersey. Therefore, it is submitted *Rosenblatt* is not only not distinguishable but controlling in the instant appeal.

Furthermore, this Honorable Court's recent decision in *American Motorists Ins. Co. v. Starnes, supra*, buttresses the appellant's claim of finality. In *American Motorists Ins. Co.*, the question on appeal under 28 U.S.C. §1257(2) was whether the venue statute of the State of Texas as

applied to foreign corporations was a violation of the Equal Protection Clause. It was merely a question of which county of the State of Texas had proper venue. This Honorable Court relegated the question of finality to a footnote and in *American Motorists Ins. Co.* concluded that the "interlocutory order" was final for the purposes of the statute. 425 U.S. at 642, n. 3.

It is respectfully submitted that the order of the Commonwealth Court in the present appeal is final for the purposes of appeal. Appellant prays that this Honorable Court deny the Appellee's Motion to Dismiss and note probable jurisdiction over this appeal.

Respectfully submitted,

KENNETH E. AARON
*Counsel for Appellant*



**Exhibit "A"**

**§672. Jurisdiction determined by court; appeal**

Wherever in any proceeding at law or in equity the question of jurisdiction over the defendant or of the cause of action for which suit is brought is raised in the court of first instance, it shall be preliminarily determined by the court upon the pleadings or with depositions, as the case may require; and the decision may be appealed to the Supreme Court or the Superior Court, as in cases of final judgments. 1925, March 5, P.L. 23, §1.

**§673. Petition; rule to show cause**

All such preliminary questions shall be raised by petition setting forth the facts relied upon, whereupon a rule to show cause shall be granted, and such preliminary question disposed of by the court. Such procedure shall be deemed de bene esse only and shall not operate as a general appearance. 1925, March 5, P.L. 23, §2.

**§674. Time for appeal**

The appeal here provided for must be taken and perfected within fifteen days from the date when the decision is rendered; shall be made returnable on the third Monday after it is taken; and shall be placed by the appellate court at the head of its argument list for civil cases to be heard at the earliest date consistent with its rules governing the presentation of appeals: Provided, That as to decision made prior to the approval of this act, the fifteen days limitation shall not begin to run until after the date of its approval. A failure to appeal within the time specified will be deemed a waiver of all objections to jurisdiction over the defendant personally. 1925, March 5, P.L. 23, §3.